

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CLARA M. BLACK)	DOCKET NUMBER BN04328410432
v.)	
DEPARTMENT OF THE TREASURY)	DATE: FEB 26 1985

OPINION AND ORDER

The agency removed appellant from the position of Mail Clerk, GS-4, effective May 29, 1984, for failing to meet the performance standards of a critical element of her position. On appeal to the Boston Regional Office, the presiding official first found that the agency's performance appraisal system had been properly approved by the Office of Personnel Management. Griffin v. Department of the Army, MSPB Docket No. CH07528210163 (October 22, 1984). She then sustained the agency's reason, finding that it had shown by substantial evidence appellant's unacceptable performance in the critical element of quantity (number of pieces of mail to be extracted) for the period of December 10, 1983, through March 10, 1984. The presiding official rejected appellant's challenges to her performance standards as well as her contention that she had been denied reasonable opportunity to improve her performance. Sandland v. General Services Administration, MSPB Docket No. PH04328310205 (October 22, 1984). Further finding that appellant had not shown harmful error or established her allegations of discrimination based on age, religion, or physical handicap, the presiding official sustained the agency action.

In her petition for review, appellant raises two allegations. First, she presents new and material evidence

relative to her claim of handicap discrimination which, she contends, was not available, despite due diligence, when the record was closed. 5 C.F.R. § 1201.115(a). The evidence consists of an affidavit and accompanying letter prepared in November 1984 by Edward Tober, M.D., appellant's physician and a brief medical report he prepared on February 15, 1984. These documents describe Dr. Tober's treatment of appellant, diagnose her condition, and offer a prognosis. Appellant contends that the affidavit and accompanying letter, which admittedly constitute material evidence, should be otherwise acceptable because Dr. Tober was unable to attend the October 16, 1984 hearing and believed the information he had already submitted was sufficient to establish the adverse impact appellant's condition had on her job performance. Appellant offers no explanation as to why the February 15, 1984 document was not available for inclusion into the record prior to its close.

However, the record reflects that appellant never indicated to the presiding official that she wished to call Dr. Tober as a witness (file, Tab 7). Nor did she request that the record remain open so that she might submit a further report from him. Therefore we cannot find that she exercised due diligence. Bowman v. Department of the Air Force, MSPB Docket No. DA07528310605 (April 17, 1984). While appellant may have failed, at the time, to realize the need for more complete medical documentation, such failure, as well, was due to her own lack of due diligence. She may not now correct her judgmental error after the fact. Powell v. Department of the Interior, 5 MSPB 35, 38 (1980). We find that none of appellant's evidentiary submissions in connection with her petition for review meet the requirement of newly available material evidence under the regulations of the Board. Avansino v. U.S. Postal Service, 5 MSPB 308 (1980).

Appellant's second allegation is that, based on the evidence, the presiding official erred in not finding appellant a "handicapped person" pursuant to 29 C.F.R. § 1613.702(a). Appellant essentially reargues the evidence and suggests that it should be evaluated differently. However, we do not find that appellant's challenges raise a serious question which would warrant our review of the entire record. Her mere disagreement with the presiding official's conclusion, amply supported by the record, does not provide a basis for Board review. Weaver v. Department of the Navy, 2 MSPB 297 (1980). We therefore find no reason to disturb the presiding official's finding that appellant failed to show that she meets the regulatory definition of a handicapped person.^{1/}

Accordingly, the Board DENIES appellant's petition for review for failing to meet the criteria set forth at 5 C.F.R. § 1201.115.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).


The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

^{1/} We note that appellant also challenges the presiding official's determination that the agency made reasonable accommodation to appellant's condition. However in view of our finding above, that the presiding official did not err in not finding appellant to be a handicapped person, we need not address the issue of reasonable accommodation, which only arises when the employee is found to be a qualified handicapped person. 29 C.F.R. § 1613.704.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e-5(f)-(k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.